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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 126

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
NANA M. COOPER and MARY COOPER, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Petitioner issued three policies on the life of Conard E. Cooper—two Kansas policies and one Oklahoma policy. Each policy provided for double indemnity, if the death of the insured was accidental as defined in the policy. The former Federal Court case was on the Kansas policies. The State Court suit was on the Oklahoma policy.(1) This suit is on the Oklahoma policy.

Both Kansas and Oklahoma adhere to the accidental result rule.

—*New York Life Insurance Company* v. *Cooper*, (C. C. A. 10) 158 F. (2d) 257;
Cooper v. *New York Life Insurance Company*, 198 Okl. 611, 180 P. (2d) 654.

(1) After remand to the trial court and entry of an order overruling the demurrer, the State Court suit was dismissed without prejudice (R. 36, 37) and the case at bar was filed.

Petitioner says that the gist of the complaint in the Federal Court suit on the Kansas policies was in all respects substantially the same as the petition in the State Court suit on the Oklahoma policy (Petition, pp. 4 and 5), and that the gist of the action in the case at bar is set forth in substantially the same language as in the State Court suit on the same policy (Petition, p. 6). Speaking of the Findings of Fact in the Federal Court suit on the Kansas policies, Petitioner says: "The court found the incidents of death substantially as stated in the complaint * * *." (Petition, p. 5.) These admissions strongly indicate there is no merit in the petition for a writ of certiorari. That such is the case we proceed to demonstrate by a detailed consideration of the petition and brief.

The points in Petitioner's brief will be discussed in their inverse order to achieve a more orderly presentation of the case. Our argument is presented under these propositions:

I.

The decision of the Supreme Court of Oklahoma in Cooper v. *New York Life Insurance Company is binding on Petitioner and on the Federal Courts, and the issue of law stands adjudicated against Petitioner.*

II.

The former Federal case on the Kansas policies adjudicated the facts in the case at bar and the Tenth Circuit Court of Appeals correctly applied the law of estoppel by judgment.

III.

There is no genuine issue of fact in this case and the motion for summary judgment was properly sustained.

And of these in their order:

I.

The decision of the Supreme Court of Oklahoma in *Cooper* v. *New York Life Insurance Company* is binding on petitioner and on the Federal Courts, and the issue of law stands adjudicated against petitioner.

This answers Petitioner's Third Point (its brief, pp. 20-25).

In *Cooper* v. *New York Life Insurance Company,* 198 Okl. 611, 180 P. (2d) 654, the plaintiff was Nana M. Cooper (a plaintiff in the case at bar), the defendant was the same defendant now before this Court, the insurance policy there sued on was the identical policy here sued on, and the allegation of the cause of death in that case is identical with the allegation of the cause of death in this case. The decision was handed down before the case at bar was commenced. The Supreme Court of Oklahoma did not depart from, but adhered to, the doctrine of *stare decisis;* it did not overrule, but followed and applied the rules of law announced in its prior decisions. To us, the language of the court on this point appears to be clear and unmistakable. We quote (198 Okl. 612, 613, 180 P. (2d) 656):

> "Since intent is a necessary element in the cause and effect of wrongful injury it is difficult to follow the reasoning of some authorities, which make a distinction between accidental means which cause a given result, and accidental results following upon the intentional use of the means employed. * * * This court has aligned itself with those authorities which recognize the unity of intent between cause and effect except where that unity is destroyed by the intervention of accident, mishap or unforeseen factors which produce unexpected results. Such intervention is deemed to be fortuitous and, in combination with cause and effect, produces an accidental result. *Union Accident Co.* v. *Willis,* 44 Okl. 578, 145 P. 812, L. R. A. 1915D, 358; *Continental Cas-*

ualty Co. v. *Clark,* 70 Okl. 187, 173 P. 453, L. R. A. 1918F, 1007; *Provident Life & Accident Ins. Co.* v. *Green,* 172 Okl. 591, 46 P. (2d) 372; *Mid-Continent Life Ins. Co.* v. *Davis,* 174 Okl. 262, 51 P. (2d) 319; *Mid-Continent Life Ins. Co.* v. *Dunnington,* 177 Okl. 484, 60 P. (2d) 1047."

After quoting from *Western Commercial Travelers Ass'n* v. *Smith,* (C. C. A. 8) 85 Fed. 401, 405, the court continued (198 Okl. 613, 180 P. (2d) 656):

> "This language was largely relied on by Mr. Justice CARDOZO in his dissenting opinion in the *Landress* case (*Landress* v. *Phoenix Mutual Life Ins. Co.,* 291 U. S. 491, 54 S. Ct. 461, 78 L. ed. 934, 90 A. L. R. 1382), which dissent this court followed, in the absence of a Federal question being involved, as the correct rule of state decision in the case of *Provident Life & Accident Ins. Co.* v. *Green, supra.*
>
> "In the instant case the unexpected results followed the recognized and the approved use of morphine sulphate as a means of alleviating pain. There was no unity of intent joining the means used and the results which followed. An unusual and extraordinary chemical reaction intervened which could not have been foreseen and which was wholly unexpected. The means used were applied externally, the reactions were immediately violent and we think, the results were purely accidental and within the terms of the double indemnity provisions of the policy."

In the light of this positive declaration by the Supreme Court of Oklahoma, and in the light of settled doctrine, Petitioner's argument (brief, pp. 20-25) can avail it nothing.[1] We particularize.

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(1) Curiously enough, the argument is a duplicate of that made by petitioner in the former Federal case with reference to the Kansas decisions, *viz.*: that Kansas does not follow the accidental result rule, and its decisions announcing that rule should be regarded as *dicta.* 158 F. (2d) 257.

Petitioner asserts that its non-liability under Oklahoma law is demonstrated by *Provident Life and Accident Ins. Co.* v. *Green,* 172 Okl. 591, 46 P. (2d) 372, *Mid-Continent Life Ins. Co.* v. *Davis,* 174 Okl. 262, 51 P. (2d) 319, and two other Oklahoma cases (brief, p. 21). The Supreme Court of Oklahoma thought otherwise, citing both the *Green* and *Davis* cases as instances of its adherence to the accidental result rule, and that court is the final arbiter of the meaning of its own decisions. Despite Petitioner's contrary assertion, the Supreme Court of Oklahoma has consistently followed the accidental result rule from *Union Accident Co.* v. *Willis,* (1915) 44 Okl. 578, 145 Pac. 812, to and including *Cooper* v. *New York Life Ins. Co.,* (1947) *supra,* which is its latest expression on the subject. Even if the contrary were true, the latest pronouncement of the Oklahoma Supreme Court is the one which the Federal Courts must follow.

—*Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 85 L. ed. 327.

That "the point was deliberately examined and considered" (brief, p. 24) is apparent from the portion of the *Cooper* opinion above quoted.

The cases from Alabama, Kentucky, California, Tennessee and Missouri, cited at page 22 of Petitioner's brief, have no bearing on any rules of law, as to *stare decisis* or otherwise, which may prevail in Oklahoma.

The close division of the judges—five to four—in the *Cooper* case in the Supreme Court of Oklahoma "does not touch the binding effect of that decision as a statement of the law of" Oklahoma.

—*Thurlow* v. *Waite-Phillips Co.,* (C. C. A. 8) 22 F. (2d) 781, cert. den. 278 U. S. 598, 73 L. ed. 528.

That the decision of the Supreme Court of Oklahoma was on demurrer, that there was no trial on the merits, that had the case been tried on the merits and appealed, the Supreme Court of Oklahoma would not have been bound by the opinion here relied upon (brief, pp. 23, 24) does not destroy the binding force of the opinion. The Supreme Court of Oklahoma has the power to reconsider or overrule its decisions, but the Federal courts do not.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 85 L. ed. 1089, Moore brought suit for damages in a Mississippi court. Judgment on the pleadings was rendered against him by the trial court. Upon appeal, the Mississippi Supreme Court reversed and remanded. Thereafter Moore amended his bill to seek more than $3,000.00 damages and the suit was removed to the Federal Courts. The question presented was the binding effect on the Federal Courts of the opinion of the Mississippi Supreme Court. Note that the state decision was not on the merits, but reversed a judgment on the pleadings. This Court held that it and the lower Federal Courts were bound by the ruling of the Mississippi Supreme Court.

There is no need to multiply authority in support of this well settled rule, but see *Huddleston* v. *Dwyer*, 322 U. S. 232, 88 L. ed. 1246.

There is no conflict between the opinion of the court below (R. 43) and the opinion of the Fourth Circuit Court of Appeals in *New England Mutual Life Ins. Co.* v. *Mitchell*, 118 F. (2d) 414. The opinion below does not announce any rule of law in conflict with the rules announced in the *Mitchell* case. The Fourth Circuit Court of Appeals held that it was bound by a decision of the Virginia Supreme Court which was squarely in point and refused to follow

dicta in an earlier Virginia case (118 F. (2d) 419). Petitioner characterizes the decision of the Supreme Court of Oklahoma in the *Cooper* case as "pure *dictum*" (brief, p. 24), which is absurd.

The issue of law stands adjudicated against Petitioner by the Supreme Court of Oklahoma.

II.

The former Federal case on the Kansas policies adjudicated the facts in the case at bar, and the Tenth Circuit Court of Appeals correctly applied the law of estoppel by judgment.

This answers Petitioner's Second Point (brief, p. 17).

Both Kansas and Oklahoma adhere to the accidental result rule. The law in the two jurisdictions is the same. That has been established by the two former actions between Nana M. Cooper and petitioner.

Complaint is made that the motion for summary judgment was not supported by any affidavit, deposition or admission. It was supported by certified transcripts of the proceedings in the two former cases, which surely are of greater dignity than affidavits. Rule 56(a) provides that the motion may be made "with or without supporting affidavits." And see:

> *Fletcher* v. *Evening Star Newspaper Co.*, (App. D. C.) 133 F. (2d) 395, cert. den. 319 U. S. 755, 87 L. ed. 1708.

The Tenth Circuit Court of Appeals did not hold that the former Federal case was *res judicata*. It did hold that there was an estoppel by judgment as to the fact issues there litigated. In this, it was eminently correct.

> —*Commissioner of Internal Revenue* v. *Sunnen*, No. 227, Oct. Term 1947, 92 L. ed. Adv. Op. 673.

III.

There is no genuine issue of fact in this case and the motion for summary judgment was properly sustained.

This is an answer to Petitioner's First Point (brief 15).

The only issue before the Supreme Court of Oklahoma in the *Cooper* case (as appears from the opinion) was whether or not "the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *." It was held that the facts alleged in the petition and admitted by the demurrer required that the issue be resolved in favor of plaintiff. That was the sole issue in the suit on the Kansas policies and in that suit the facts were adjudicated. It is the sole issue here. The substantial identity of allegations of the cause of death in the former Federal suit, the State Court suit and this suit is admitted by petitioner (Pet. 4-6). In the suit on the Kansas policies the court found that morphine injections were the sole cause of death. That finding necessarily negatives the existence of all other causes. -In that case petitioner could have proved any fact that showed death was not accidental. It did not do so. It is bound by the adjudication of the cause of death.

But petitioner says (Brief p. 15):

> "One precise point * * * is whether * * * where unexpected fatal results follow * * * treatment, generally known to be an effect of the treatment, but an effect much less likely to occur than beneficient effects, there is liability under the conventional clause allowing * * * double indemnity * * *",

and claims a right to trial on this "defense".

This "precise point" appears to be alleged in paragraph XVII of the answer. (R. 13). That issue was litigated and decided against petitioner in the suit on the Kansas policies. In that case the answer denied that the death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and alleged that it resulted from physical infirmity, illness and disease. (Ans. pars. VIII, IX, XI, R. 25, 26). On the trial of that cause evidence was adduced by Petitioner as to the known effects of the use of morphine, and on such evidence the trial court found:

> "One of the known effects of the drug morphine is depression of the respiratory center. * * * Used as a pain-killer and sedative, morphine slows the respiration rate as a normal consequence, but entire collapse of the respiratory center is only a bare eventuality; in rare instances a single one-fourth grain injection has caused complete respiratory suspension." (Part of Finding VI, R. 28),

and concluded:

> "While it is true that the complete collapse of the respiratory system may follow the injection of morphine sulfate, such a result is regarded by physicians as only a remote possibility and is not to be expected." (Part of Conclusion III, R. 29),

which the Court of Appeals below properly said is also a Finding of Fact (R. 47).

Sunstroke is a known effect of exposure to the sun, and the Supreme Court of Oklahoma holds that sunstroke is an accident. (*Provident Life & Accident Company* v. *Green*, 172 Okl. 591, 46 P. (2d) 372; *Continental Casualty Company* v. *Clark*, 70 Okl. 187, 173 Pac. 453); infection is a known effect of a blistered foot, but death therefrom was

held to be an accident in the *Smith* case, (85 F. 401) which is quoted from with approval by the Oklahoma Supreme Court in *Cooper* v. *New York Life Insurance Company*. Petitioner's argument is one that long ago evoked a statement that has since been quoted often: "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." Hallsbury, L. C., in *Britons* v. *Turvey*, (1905) A. C. 230, 233, 2 Ann. Cas., 137.

The simple truth is that the Oklahoma Supreme Court held defendant would be liable upon proof of the facts alleged in that suit; those same facts are alleged in this suit (Compare R. 6-32) *and are conclusively established by the facts found in the former Federal suit.* (R. 27) *No play on words, no tenuous argument, can enable petitioner to escape from this simple truth.*

Defendant's answer in this case (R. 10) consists of admissions, (Pars. I to VII) allegation of failure to state a claim, (Par. VIII) averments and denials of utmost generality stating conclusions as to matters of law decided against it by the Oklahoma Supreme Court, (Pars. IX to XX) and the few "facts" alleged were decided against it in the former Federal Court suit (Pars. XV, XVI, XVII). The answer is of the type which has been commented on by many lower Federal Courts. Thus in *Engl* v. *Aetna Life Ins. Co.*, (2 Cir.) 139 F. (2d) 469:

> "Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." (Citing cases.)

When the motion for summary judgment came on for hearing Petitioner, in the face of the showing made, could

not stand mute, suffer an adverse judgment, and then seek reversal by pointing to the general language of its answer and claiming the right to a trial. If any facts existed which justified a trial, Petitioner should have shown their existence by affidavit opposing the motion. The lower courts are unanimous in this holding.

—*Engl* v. *Aetna Life Ins. Co., supra,* (2 Cir.) 139 F. (2d) 469, 472, 473;
Wilkinson v. *Powell,* (5 Cir.) 149 F. (2d) 335, 337;
Williams v. *Kolb,* (App. D. C.) 145 F. (2d) 344;
Fletcher v. *Krise,* (App. D. C.) 120 F. (2d) 809, 812;
Schreffler v. *Bowles,* (10 Cir.) 153 F. (2d) 1, 3.

Petitioner filed no such affidavit. In view of the issues litigated and the facts found in the former Federal case we suggest it could not have done so without incurring the penalty of having the affidavit stricken as filed in bad faith or for the purpose of delay. See Rule 56(g).

We again repeat that cases from other jurisdictions, including the case of *Preferred Accident Co.* v. *Clark,* (brief, p. 16) are immaterial here. In the former Federal case, on petition for rehearing (158 F. (2d) 259) the court disposed of the *Clark* case as authority. As we have shown, both Kansas and Oklahoma adhere to the accidental result rule.

Clearly, the answer is a sham and the decision of the Tenth Circuit Court of Appeals is correct.

A motion for summary judgment pierces the formal allegation of a pleading, "* * * and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174-3175. The rule is now well established in the many cases dealing with this problem."

—*Lindsey* v. *Leavy,* (9th Cir.) 149 F. (2d) 899, 901.

The lower Federal Courts are unanimous in holding that former judgments may be presented by motion.

—*Billings Utility Co.* v. *Advisory Committee, Board of Governors,* (8th Cir.) 135 F. (2d) 108;

Schwartz v. *Levine & Malin, Inc.,* (2 Cir.) 111 F. (2d) 81;

Jones v. *Zurich Genl. Acc. & Liability Ins. Co., Ltd.,* (2 Cir.) 121 F. (2d) 761;

Eller v. *Paul Revere Life Ins. Co.,* (8th Cir.) 138 F. (2d) 403;

Herzog v. *Des Lauriers Steel Mould Co.,* (D. C., E. D. Pa.) 46 F. Supp. 211;

Cf. *Sabin* v. *Home Owners Loan Corp.* (10 Cir.) 151 F. (2d) 541;

Cf. *Levinson* v. *Cohen,* (D. C., S. D., N. Y.) 31 F. Supp. 96;

Cf. *Hartman* v. *Time, Inc.,* (3 Cir.) 166 F. (2d) (Adv. Sheets) 127;

3 Moore's Federal Practice, pp. 3181, 3182, especially note 3, p. 3182.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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